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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

7 JEANNE K.,

8 Plaintiff,

CASE NO. C18-1844-MAT

9 v.

ORDER RE: SOCIAL SECURITY  
DISABILITY APPEAL

10 ANDREW M. SAUL,  
Commissioner of Social Security,<sup>1</sup>

11 Defendant.  
12

13 Plaintiff proceeds through counsel in her appeal of a final decision of the Commissioner of  
14 the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's  
15 application for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after  
16 a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the  
17 administrative record (AR), and all memoranda of record, this matter is REVERSED and  
18 REMANDED for further administrative proceedings.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1966.<sup>2</sup> She has a high school diploma, and has worked as  
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22 <sup>1</sup> Andrew M. Saul is now the Commissioner of the Social Security Administration. Pursuant to Federal Rule  
of Civil Procedure 25(d), Andrew M. Saul is substituted for Nancy A. Berryhill as defendant in this suit.

23 <sup>2</sup> Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 an in-home caregiver, supervisory pawn broker, retail cashier, and travel agent. (AR 248, 263.)

2 Plaintiff applied for DIB and SSI in August 2015. (AR 219-26.) Those applications were  
3 denied initially and upon reconsideration, and Plaintiff timely requested a hearing. (AR 139-46,  
4 149-63.)

5 On June 6, 2017, ALJ Glenn G. Meyers held a hearing, taking testimony from Plaintiff and  
6 a vocational expert (VE). (AR 40-78.) On February 22, 2018, the ALJ issued a decision finding  
7 Plaintiff not disabled. (AR 15-28.) Plaintiff timely appealed. The Appeals Council denied  
8 Plaintiff's request for review on October 24, 2018 (AR 1-6), making the ALJ's decision the final  
9 decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this  
10 Court.

### 11 **JURISDICTION**

12 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

### 13 **DISCUSSION**

14 The Commissioner follows a five-step sequential evaluation process for determining  
15 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must  
16 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not  
17 engaged in substantial gainful activity since February 28, 2015, the alleged onset date. (AR 17.)  
18 At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ  
19 found severe Plaintiff's fibromyalgia, bipolar disorder, depressive disorder, and borderline  
20 personality disorder. (AR 17-18.) Step three asks whether a claimant's impairments meet or equal  
21 a listed impairment. The ALJ found that Plaintiff's impairments did not meet or equal the criteria  
22 of a listed impairment. (AR 18-19.)

23 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess

1 residual functional capacity (RFC) and determine at step four whether the claimant has  
2 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of  
3 performing light work with additional limitations: she can lift/carry 20 pounds occasionally and  
4 10 pounds frequently. She can stand and/or walk about six hours in an eight-hour workday, and  
5 sit about six hours in an eight-hour workday. She can perform occasional stooping, squatting,  
6 crouching, crawling, kneeling, and climbing ramps and stairs, and can never climb ropes, ladders,  
7 or scaffolds. She can engage in unskilled, repetitive, routine tasks in two-hour increments. She  
8 can work in proximity to but not in coordination with co-workers, with occasional contact with  
9 supervisors and superficial, incidental contact with the public. She will be off-task at work up to  
10 10% of the time, but can still meet the minimum production requirements of the job. She will be  
11 absent from work one time per month. (AR 19.) With that assessment, the ALJ found Plaintiff  
12 unable to perform past relevant work. (AR 26.)

13       If a claimant demonstrates an inability to perform past relevant work, the burden shifts to  
14 the Commissioner to demonstrate at step five that the claimant retains the capacity to make an  
15 adjustment to work that exists in significant levels in the national economy. With the help of the  
16 VE, the ALJ found Plaintiff capable of transitioning to other representative occupations, such as  
17 office helper, maid, and mailroom clerk. (AR 27-28.)

18       This Court's review of the ALJ's decision is limited to whether the decision is in  
19 accordance with the law and the findings supported by substantial evidence in the record as a  
20 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more  
21 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable  
22 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750  
23 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's

1 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.  
2 2002).

3 Plaintiff argues the ALJ erred in failing to further develop the record, and also erred in a  
4 number of other ways. Dkt. 10 at 2. The Commissioner argues that any errors are harmless, and  
5 that the ALJ's decision is supported by substantial evidence and should be affirmed.

6 Failure to develop the record

7 At the administrative hearing, counsel noted that the record was incomplete and that  
8 Plaintiff's recent counseling notes had not been obtained because the agency had requested  
9 evidence from the wrong entity. (AR 44-46, 75-78, 324-32.) At the conclusion of the hearing, the  
10 ALJ indicated that he was going to request the records from the correct entity. (AR 75-78.) The  
11 ALJ did not apparently do so, however, and the decision makes no mention of those outstanding  
12 records and instead assumes that Plaintiff did not receive recent treatment and that her counselor's  
13 opinion was unsupported by treatment notes. (AR 20-22, 24.)

14 Although the Commissioner suggests that the ALJ's error in failing to obtain the records  
15 is harmless because Plaintiff cannot show that the missing records are significant or how they  
16 might undermine the ALJ's decision, this argument is unpersuasive.<sup>3</sup> Dkt. 14 at 12. The ALJ  
17 discounted Plaintiff's allegations as well as her treating counselor's opinion based on the lack of  
18 recent counseling notes, and thus even without knowing the content of the counseling notes, it is  
19 clear that the notes are relevant to the ALJ's decision. The ALJ implied as much when he stated  
20 that he would obtain the records in order to complete the record. (AR 76-77.) The ALJ's apparent  
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22 <sup>3</sup>The Commissioner also suggests elsewhere in the response brief that Plaintiff could have obtained  
23 the records herself (Dkt. 14 at 10-11), but Plaintiff informed the agency in April 2017 that she could not  
afford to pay for her medical records and thereby asked the agency to request them. (AR 326.)

1 failure to follow through on his stated intention to complete the record amounts to a failure of his  
2 duty to fully and fairly develop the record. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th  
3 Cir. 2001) (indicating that an ALJ's own finding that the record is inadequate to allow for proper  
4 evaluation of the evidence triggers the ALJ's duty to further develop the record).

5 Because Plaintiff's counseling notes may impact all of the ALJ's challenged findings, the  
6 Court need not address the other assignments of error at this time. On remand, the ALJ shall  
7 request the Plaintiff's counseling notes from the correct entity and otherwise update the record as  
8 necessary, hold a new hearing, and issue a new decision.

9 **CONCLUSION**

10 For the reasons set forth above, this matter is REVERSED and REMANDED for further  
11 administrative proceedings.

12 DATED this 26th day of July, 2019.

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15 Mary Alice Theiler  
16 United States Magistrate Judge  
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